Supreme Court, U.S.
FILED
(1)

931174 JAN 18 1994

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RAMON MARTINEZ AND RODOLFO RAMIREZ,
PETITIONERS

VS.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH A. CONNORS III
Counsel of Record
212 W. Nolana
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

ATTORNEY FOR PETITIONERS

January 18, 1994

PET1:PETITION

30

FIRST QUESTION PRESENTED FOR REVIEW

After the trial court refused to instruct the jury "on the methods of proving knowledge," petitioners were denied constitutional due process when the court of appeals found (Pet.App. 20-21) in effect that in lieu of the trial court's obligations under F.R.Cr.P. 30, defense counsel effectively instructed the jury on the law "on the methods of proving knowledge", since what the lawyers say "does not count if different from the judge's law", for the court instructed the jury that it is the trial court's job to instruct the jury on the law that applies in the case (Pet.App. 56; 15R p. 973, lines 15-16) and "[w]hat the attorneys say is not binding on you" and a lawyer's statements are "not evidence in the case" (Pet.App. 57; 15R p. 976, lines 15-16, 22-23).

SECOND QUESTION PRESENTED FOR REVIEW

By finding no harmful error, the court of appeals affirmed the convictions in the face here of reversible error under the implications of Giglio v. U.S., 405 U.S. 152 (1972), where

a. on opening statement defense counsel was judicially prohibited from discussing law relevant to accomplice Javier Guerra's credibility (Point of Error No. 3 at CA5);

b. on cross-examination of the Government's main witness Javier Guerra, defense counsel was judicially prohibited from inquiring about law relevant to Javier Guerra's credibility (Point of Error No. 4 at CA5);

c. although requested, the trial court refused to instruct the jury on that requested law relevant to Javier Guerra's credibility; and

d. where the jury did not learn from the

court

1. that the trial prosecutor's boss, the U.S. attorney, had the exclusive right to decide whom to charge, prosecute and put to trial (Point of Error No. 6 at CA5);
2. when it is a federal offense to lie to a federal officer as Javier Guerra had done (Point of Error No. 7 at CA5);
3. when it is a federal offense to money launder as Javier Guerra had done (Point of Error No. 8 to CA5); and
4. that before departure, Javier Guerra's guideline sentencing range was to be between 78 and 90 months incarceration (Point of Error No. 9 at CA5).

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit were the United States of America and Petitioners Ramon Martinez, Rodolfo Ramirez and James Caudill.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Ramon Martinez was represented at trial by attorney Joseph A. Connors III.

Petitioner Rodolfo Ramirez was represented at trial by attorney L. Aaron Pena.

On appeal, Mr. Connors represented both Petitioners.

TABLE OF CONTENTS

	Page
FIRST QUESTION PRESENTED FOR REVIEW . .	i
SECOND QUESTION PRESENTED FOR REVIEW .	ii
LIST OF ALL PARTIES BELOW	iv
STATEMENT OF RELATED CASES AND PROCEEDINGS	iv
IDENTITY OF DEFENSE COUNSEL BELOW . . .	iv
THIS TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
Cases	vi
United States Constitution . .	vi
United States Statutes	vii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED . .	2
STATEMENT OF THE CASE	2
A. Appeal Court's Jurisdiction .	2
B. Procedural History In District Court	3
C. Statement Of Facts	3
SUMMARY OF ARGUMENT ON REASON FOR REVIEW	7
ARGUMENT ON QUESTION ONE	8
ARGUMENT ON QUESTION TWO	12
CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases

Cheek v. U.S., 498 U.S. ____,
111 S.Ct. 604,
112 L.Ed.2d 617 (1991) 10

Cool v. U.S., 409 U.S. 100,
93 S.Ct. 355,
34 L.Ed.2d 335 (1972) 11, 12

Giglio v. U.S., 405 U.S. 150,
92 S.Ct. 763,
31 L.Ed.2d 104
(1972) . . . . . ii, 14-19

Mathews v. U.S., 485 U.S. 58, 62,
108 S.Ct. 883,
99 L.Ed.2d 54 (1988) 10

U.S. v. Agurs, 427 U.S. 97,
96 S.Ct. 2392,
49 L.Ed.2d 342 (1976) 15

U.S. v. Bagley, 473 U.S. 667,
105 S.Ct. 3375,
87 L.Ed.2d 481 (1985) 16

United States v. Martinez, Ramirez and
Caudell, No. 92-7046 1

United States Constitution

Fifth Amendment 2, 15, 16

United States Statutes

18 U.S.C.
1001 19
1956 19

28 U.S.C.
1254(1) 2
1291 2

F.R.Cr.P.
30 i

Supreme Court Rule
10.1(a) 7

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

RAMON MARTINEZ AND RODOLFO RAMIREZ,
PETITIONERS

v.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

RAMON MARTINEZ AND RODOLFO RAMIREZ petition for review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

On September 20, 1993, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgments of conviction in this case. United States v. Martinez, Ramirez and Caudell, No. 92-7046. This opinion is unreported (Pet.App. 3-25).

JURISDICTION

On September 20, 1993, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. On October 20, 1993, that appeals court denied Ramon Martinez and Rodolfo Ramirez first motion for rehearing (Pet.App. 26-27).

Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ....

STATEMENT OF THE CASE

A. Appeal Court's Jurisdiction

The Court of Appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History In District Court

The petitioners, Ramon Martinez and Rodolfo Ramirez were convicted by a jury of conspiracy with intent to distribute marijuana and marijuana possession with intent to distribute. The district court sentenced petitioner Martinez to 97 months in the custody of the United States Bureau of Prisons, a three year supervised release and a $100.00 special assessment. The district court sentenced petitioner Ramirez to 70 months in the custody of the United States Bureau of Prisons, a three year supervised release and a $100.00 special assessment.

C. Statement Of Facts

Ramon Martinez (Martinez), Rodolfo Ramirez (Ramirez), James Caudill (Caudill), and seven others were indicted for conspiracy with intent to distribute marijuana and possession with intent to began on February 1, 1991, and the possession took place on February 8, 1991. The object of the

conspiracy was to transport marijuana in truckloads of produce.

The Government acknowledges that the case against the three defendants was based primarily on the testimony of their coconspirator Javier Guerra (Guerra). Guerra pleaded guilty to the possession count of the indictment and agreed to cooperate fully with the Government. Most of the facts of the case come from Guerra's testimony.

Felix Ramirez (Felix) and Benigno Olvera (Olvera) were running a marijuana smuggling operation. Ramirez and Caudill worked for Felix and Olvera. In January 1991, 1,200 pounds of marijuana was delivered to Guerra's mobile home where it was to be hidden in a secret compartment. Guerra and others wrapped the marijuana in plastic wrap. The marijuana was transferred from Guerra's mobile home to a location in Elsa, Texas, by Caudill. From there, it was placed into a white tractor trailer truck belonging to

Cheetah Truck Lines. Caudill drove the tractor trailer truck and the marijuana to Tampa, Florida. Guerra and Felix followed the truck to Houston and then flew to Tampa, where they met Caudill. The marijuana was then unloaded from the tractor trailer into another vehicle by Guerra, Ramirez, and others.

A second load of marijuana stored at Guerra's mobile home was to be hauled to Florida by Caudill. However, the exchange did not take place. Caudill told Guerra that his shed had been raided by the authorities and that Guerra was to wait for further instructions. Subsequently, Guerra was introduced to defendant Martinez by Felix and Olvera. Martinez was to transport the marijuana to Florida. The marijuana was transferred to Radco Farms where Guerra loaded it onto Martinez's tractor trailer truck. Martinez witnessed the loading and Guerra testified that Martinez knew that it

was marijuana.

The marijuana was packed in cabbage boxes. Guerra gave Martinez a bill of lading showing 140 empty boxes. Martinez objected stating that if he was stopped the police would want to know why he was carrying 140 empty boxes. Guerra then took the bill of lading back to his house where he met defendant Ramirez, Felix, and Olvera. Felix and Olvera took the bill of lading to have it changed and Ramirez and Guerra went to the Dairy Queen to wait for them to return.

Felix and Olvera changed the bill of lading and gave it to Martinez and met the other two at the Dairy Queen. When Martinez drove by the Dairy Queen, Ramirez and Guerra followed him in Ramirez's brown two-tone Grand Prix. They were to follow Martinez to Houston, but Martinez was pulled over in San Manuel. With the aid of a drug-sniffing dog, the marijuana was discovered.

In April or May 1991, a third load of

marijuana was driven from Texas to New York by Caudill. Guerra and Ramirez assisted in the loaded and unloading of the marijuana.

Martinez, Ramirez, and Caudill were tried before a jury. All three defendants were convicted on both counts of the indictment. Martinez was sentenced to 97 months of imprisonment on each count with the terms to run concurrently. Ramirez was sentenced to 70 months of imprisonment on each count of the indictment with the terms to run concurrently. Caudill was sentenced to 140 months of imprisonment on each count, both terms to also run concurrently. Martinez, Ramirez, and Caudill all timely filed notices of appeal.

SUMMARY OF ARGUMENT ON REASON FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because the Fifth Circuit Court of Appeals has so far departed from the accepted and

usual course of judicial proceedings.

ARGUMENT ON QUESTION ONE

In their rehearing point of error no. 5, petitioners complained of the court of appeals' denying them due process in resolving their point of error no. 11, which read (Pet.App. 97):

> The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction as to the method of proving knowledge.

On rehearing, petitioners argued (Pet.App. 87-89):

> The Court of Appeals finds (Opinion at p. 11):
>
> > Taking the district court's instruction together with counsel's argument shows that the defense was adequately submitted to the jury. Ramirez-Rizo, 809 F.2d at 1071-72.
>
> Appellants Martinez and Ramirez submit that it is a denial of due process on appeal for the appellate court to find the trial court's instructions together with counsel's argument show that the defense of no knowledge was adequately submitted to the jury

and either no harm occurred or harmless error occurred when the trial court refused to submit proper jury "knowledge" instructions requested by appellant Martinez and concurred in by appellant Ramirez. Since the jury only receives the applicable law from the court, appellants were denied due process in the trial court when the trial judge failed to instruct the jury as requested in appellant Martinez' requested jury instruction as to the method of proving knowledge.

Appellants conclude that it is a violation of due process for the trial judge to deny proper jury instructions and for the appellate court to say there is no error because the defense lawyer argued that same law which the judge omitted from instructing the jury on. Appellant recognizes that this panel of the Court of Appeals must follow prior precedent. So unless this case is taken en banc, this panel will likely follow prior precedent, unless the constitutional problem remains unaddressed by prior circuit precedent. Compare United States v. Fooladi, 746 F.2d 1027, 1031-32 (CA5 1984), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 382 (1985) [where the district court erred in not instructing on a defensive theory, for the trial judge's imprimatur on a defensive theory is important; but the defendant's "conviction was saved by circumstance that his case was fully developed and argued to the

jury--ironically because he was well defended"].

Petitioners here renew those above arguments and call the Court's attention to the following three cases which demonstrate how important jury instructions are to the validity of the jury's convictions here.

In Mathews v. U.S., 485 U.S. 58, 62, 108 S.Ct. 883, 886, 99 L.Ed.2d 54 (1988), the Court reversed the Court of Appeals and remanded to that court holding "that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." The Court added:

> As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.

Id., 485 U.S. at 63, 108 S.Ct. at 887.

In Cheek v. U.S., 498 U.S. ____, 111 S.Ct. 604, 611, 613, 112 L.Ed.2d 617 (1991),

the Court held that it was error for the district court to instruct the jury in determining whether Cheek had acted willfully, to disregard evidence of Cheek's asserted beliefs and understanding that, within the meaning of the Internal Revenue Code, he was not a taxpayer nor a person required to file a return or to pay income taxes and that wages are not taxable income.

In Cool v. U.S., 409 U.S. 100, 93 S.Ct. 355, 34 L.Ed.2d 335 (1972), the Court reversed the conviction and remanded the cause because the clear implication of the trial court's instruction was that the jury should disregard defense accomplice witness Voyles' testimony unless the jury was "convinced it is true beyond a reasonable doubt." That instruction had the effect of substantially reducing the Government's burden of proof and the constitutionally rooted presumption of innocence. "Such an instruction places an improper burden on the

defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt." Id., 409 U.S. at 102-103, 93 S.Ct. 356.

Thus, petitioners' convictions should be reversed for the trial court reversibly erred in not instructing the jury as requested in Defendant's Requested Jury Instruction numbered as follows by its respective page eight (Pet.App. 70-73). The jury was judicially deprived of that essential information needed to make a proper decision on whether or not petitioners knowingly possessed the marijuana. In rejecting this contention the Court of Appeals reversibly erred.

ARGUMENT ON QUESTION TWO

As to the instructions not given to the jury, the court of appeals resolved those issues against petitioners (Pet.App. 18-23). In rehearing point of error no. 4, petitioners complained (Pet.App. 85-86):

> As to points of error nos. 7 through 9 and 13, the Court fails to deal with appellants' contention that those requested jury instructions dealt with law issues the jury needed to know to accurately analyze Javier Guerra's credibility based on the full consequences of all the deal Guerra received by cooperating with the Government. Compare Opinion at pgs. 12-13.

Thereunder, petitioners argued (Pet.App. 101-102):

> In their brief appellants argued at pgs. 47-48:
>
> > Since there was little other substantive evidence other than Javier Guerra's testimony to prove Mr. Martinez's or Mr. Ramirez's guilt, it was imperative that they be allowed the opportunity to dispute the credibility of Javier Guerra. Mr. Guerra lied to agent Gonzalez on more than one occasion. The jury had every right to know that lying to a federal officer was a federal offense, and Mr. Guerra was not so charged by the Government because the Government chose not to charge him. The jury also had every right to

> know that Mr. Guerra was also guilty of the offense of money laundering and that he was not so charged because the Government chose not to charge him. The jury also had every right to know about what kind of sentence Mr. Guerra was avoiding by pleading guilty and assisting the Government in his "testimony". All this had a bearing on Javier Guerra's credibility to show any motive Mr. Guerra had to lie, and the jury had every right to know that there was plenty to lie about.

Although requested and their omission objected to (Pet.App. 74-80, 50-52), the trial court failed to so instruct the jury on all the law relevant to weigh the credibility of accomplice Javier Guerra. Thus the jury did not receive the truth about the Government's entire "deal" with Javier Guerra. Reversible error results when Governmental promises of leniency to a government witness are not disclosed to the jury. Giglio v. U.S., 405 U.S. 152, 92 S.Ct.

763, 31 L.Ed.2d 104 (1972). In fact, the trial court had prohibited defense counsel from going into some of those areas on opening statement (7R 30-31) (which matter was a subject of petitioners' rehearing point of error no. 2; Pet.App. 82-85) and prohibited defense counsel from going into some of those areas on cross-examination of Javier Guerra (9R 376-379; 387-392; 404-409) (which matter was the subject of petitioners' brief point of error no. 4; Pet.App. 92-95).

In resolving this issue the Court's attention is called to the following three cases which are applicable here by implication and as a foundation upon which to build herein.

"We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution." U.S. v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976)[where in the context of the entire

record, the Court held that the prosecutor's failure to tender Sewell's prior record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment].

In U.S. v. Bagley, 473 U.S. 667, 684, 105 S.Ct. 3375, 3385, 87 L.Ed.2d 481 (1985), the Court reversed the judgment of the court of appeals and remanded the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

In Giglio v. U.S., 405 U.S. 150, 153-155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972), the Court said:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice."

This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id., at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." Napue,

supra, at 271, 79 S.Ct., at 1178.

In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due

process requirements enunciated in Napue and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Although the jury heard many of the details and the generalities of the Government's "deal" with Javier Guerra, the jury was never informed by the trial court of the applicable law under 18 U.S.C. 1001 and 1956 so the jury would actually know that the Government had agreed not to prosecute Javier Guerra as to certain specific crimes he factually detailed in his testimony. Those crimes included false statements under 18 U.S.C. 1001 and money laundering under 18 U.S.C. 1956. Additionally, the jury was not informed by the Court or the Government as to the potential sentence Javier Guerra was facing under the applicable federal

sentencing guidelines prior to any governmental motion for a downward departure because of substantial cooperation by Javier Guerra. The jury should have been told about all the specific benefits Javier Guerra received from the executive branch of the Government. The jury should also have been informed that through the United States Attorney for the Southern District of Texas, the executive branch of the Government has the exclusive right to decide whom to seek charges against and to prosecute and to bring to trial for alleged involvement in criminal conduct. Thus, the trial court reversibly erred in not granting Defendant's Second Request Instructions numbered as follows by their respective pages three, four, five, and six (Pet.App. 74, 77-80). The jury was judicially deprived of that essential information needed to make a proper decision on whether or not Javier Guerra was credible when he said that petitioners knowingly

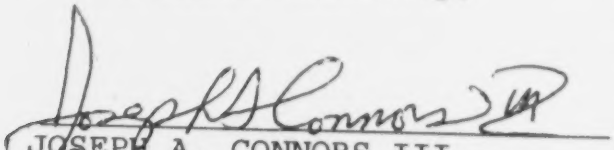
conspired to possess the marijuana and knowingly possessed the marijuana. In rejecting this contention the Court of Appeals reversibly erred.

CONCLUSION

For the foregoing compelling reasons, this Court should grant this petition for writ of certiorari, and reverse the convictions and remand this case to the Court of Appeals with instructions.

DATED: January 18, 1994.

Respectfully submitted by
Petitioners' Attorney,



JOSEPH A. CONNORS III
Texas Bar No. 04705400
212 W. Nolana
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

Supreme Court, U.S.
FILED
93 1174 JAN 18 1994
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RAMON MARTINEZ AND RODOLFO RAMIREZ,
PETITIONERS

VS.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION

JOSEPH A. CONNORS III
Counsel of Record
212 W. Nolana
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

ATTORNEY FOR PETITIONERS

January 18, 1994

PET1:APPENDIX

104 pp

TABLE OF CONTENTS TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS 2

CIRCUIT COURT'S OPINION 3-25

CIRCUIT COURT'S REHEARING ORDER . . 26-27

DISTRICT COURT'S JUDGMENT FOR RAMON MARTINEZ 28-38

DISTRICT COURT'S JUDGMENT FOR RODOLFO RAMIREZ 39-49

COURT'S JURY CHARGE CONFERENCES . . 50-52

FORMAL OBJECTIONS TO JURY CHARGE . 53-55

COURT'S JURY INSTRUCTIONS 56-69

DEFENDANT'S REQUESTED JURY INSTRUCTIONS 70-73

DEFENDANT'S SECOND REQUESTED JURY INSTRUCTIONS 74-80

APPELLANTS' REHEARING MOTION . . . 81-90

APPELLANTS' BRIEF IN PART . . . 91-104

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-7046
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RAMON MARTINEZ, RODOLFO RAMIREZ
and JAMES CAUDILL,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Texas

(CR-91-0072-01, 07 & 06)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Ramon Martinez (Martinez), Rodolfo Ramirez (Ramirez), James Caudill (Caudill), and seven others were indicted for conspiracy with intent to distribute marijuana and possession with intent to began on February 1, 1991, and the possession took place on February 8, 1991. The object of the conspiracy was to transport marijuana in truckloads of produce.

The Government acknowledges that the case against the three defendants was based primarily on the testimony of their coconspirator Javier Guerra (Guerra). Guerra pleaded guilty to the possession count of the indictment and agreed to cooperate fully with the Government. Most of the facts of the case come from Guerra's testimony.

Felix Ramirez (Felix) and Benigno Olvera (Olvera) were running a marijuana smuggling operation. Ramirez and Caudill worked for Felix and Olvera. In January 1991, 1,200

pounds of marijuana was delivered to Guerra's mobile home where it was to be hidden in a secret compartment. Guerra and others wrapped the marijuana in plastic wrap. The marijuana was transferred from Guerra's mobile home to a location in Elsa, Texas, by Caudill. From there, it was placed into a white tractor trailer truck belonging to Cheetah Truck Lines. Caudill drove the tractor trailer truck and the marijuana to Tampa, Florida. Guerra and Felix followed the truck to Houston and then flew to Tampa, where they met Caudill. The marijuana was then unloaded from the tractor trailer into another vehicle by Guerra, Ramirez, and others.

A second load of marijuana stored at Guerra's mobile home was to be hauled to Florida by Caudill. However, the exchange did not take place. Caudill told Guerra that his shed had been raided by the authorities and that Guerra was to wait for further

instructions. Subsequently, Guerra was introduced to defendant Martinez by Felix and Olvera. Martinez was to transport the marijuana to Florida. The marijuana was transferred to Radco Farms where Guerra loaded it onto Martinez's tractor trailer truck. Martinez witnessed the loading and Guerra testified that Martinez knew that it was marijuana.

The marijuana was packed in cabbage boxes. Guerra gave Martinez a bill of lading showing 140 empty boxes. Martinez objected stating that if he was stopped the police would want to know why he was carrying 140 empty boxes. Guerra then took the bill of lading back to his house where he met defendant Ramirez, Felix, and Olvera. Felix and Olvera took the bill of lading to have it changed and Ramirez and Guerra went to the Dairy Queen to wait for them to return.

Felix and Olvera changed the bill of lading and gave it to Martinez and met the

other two at the Dairy Queen. When Martinez drove by the Dairy Queen, Ramirez and Guerra followed him in Ramirez's brown two-tone Grand Prix. They were to follow Martinez to Houston, but Martinez was pulled over in San Manuel. With the aid of a drug-sniffing dog, the marijuana was discovered.

In April or May 1991, a third load of marijuana was driven from Texas to New York by Caudill. Guerra and Ramirez assisted in the loaded and unloading of the marijuana.

Martinez, Ramirez, and Caudill were tried before a jury. All three defendants were convicted on both counts of the indictment. Martinez was sentenced to 97 months of imprisonment on each count with the terms to run concurrently. Ramirez was sentenced to 70 months of imprisonment on each count of the indictment with the terms to run concurrently. Caudill was sentenced to 140 months of imprisonment on each count, both terms to also run concurrently.

Martinez, Ramirez, and Caudill all timely filed notices of appeal.

OPINION

Martinez and Ramirez argue on appeal that there was insufficient evidence to support their convictions for conspiracy to possess with intent to distribute marijuana. Caudill does not challenge the sufficiency of the evidence with respect to the conspiracy charge. To support a conspiracy conviction, the Government has the burden to prove that there was an agreement to violate the drug laws, that the defendants knew of this conspiracy, and that they voluntarily joined it. United States v. Onick, 889 F.2d 1425, 1432 (5th Cir. 1989).

The standard for determining sufficiency of the evidence to support a conviction is whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B

1982) (en banc), aff'd, 462 U.S. 356 (1983). In making this determination, the evidence is viewed in the light most favorable to the Government and the inferences and credibility choices are resolved in favor of the verdict. United States v. Santisteban, 833 F.2d 513, 516 (5th Cir. 1987).

The principal argument of both Martinez and Ramirez on appeal is that the link between them and the drug conspiracy was the testimony of Guerra. They contend that Guerra was unworthy of belief because he had made a deal with the Government. However, the arrangement was made known to the jury. Whether Guerra was credible is a determination that is "within the exclusive province of the jury." United States v. Ruiz, 987 F.2d 243, 250 (5th Cir.), petition for cert. filed, (Jun 21, 1993) (No. 92-9187). The jury obviously believed Guerra and their credibility determination will not be disturbed.

With respect to Ramirez, Guerra testified that Ramirez helped Guerra unload the first delivery of marijuana in Tampa, Florida. Guerra also testified that Ramirez was involved in the unloading in the third load of marijuana. On the second load of marijuana, Guerra and Ramirez followed the tractor trailer containing the drugs in Ramirez's car until it was stopped by a Texas Department of Public Safety officer. At that point, Ramirez drove to a telephone and notified his superiors of the incident. Ramirez's vehicle was seen driving behind the tractor trailer truck prior to its apprehension.

With respect to Martinez, Guerra testified that he was introduced to Martinez as the person who was going to drive the second load of marijuana. Guerra testified that Martinez was present when the marijuana was loaded into the truck and that Martinez knew that it was marijuana. Guerra also

testified that Martinez requested that the bill of lading be changed because it showed 140 empty boxes and that such a discrepancy may cause trouble if he was stopped by law enforcement officers.

Giving effect to all reasonable inferences from Guerra's testimony, we affirm the convictions for conspiracy of both Martinez and Ramirez. There was sufficient evidence to show that there was an agreement to violate the drug laws, that these two individuals knew of the agreement, and that they voluntarily joined it.

All three defendants challenge the sufficiency of the evidence supporting the conviction on the possession count of the indictment. To prove possession, the Government must produce enough evidence to show that a defendant knowingly possessed the marijuana and intended to distribute it. United States v. Rodriquez Mireles, 896 F.2d 890, 893 (5th Cir. 1990). Further, "[a]

party to a conspiracy may be held responsible for a substantive offense committed by a coconspirator in furtherance of the conspiracy, even if that party does not participate in or have any knowledge of the substantive offense." United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990). "'This principle has been repeatedly applied by this circuit in cases involving drug conspiracies and substantive drug violations.'" Id. (quoting United States v. Michel, 588 F.2d 986, 999 (5th Cir.), cert. denied, 444 U.S. 825 (1979)). The standard of review is the same as outlined above.

Guerra testified that the second shipment of marijuana was supposed to be made in February 1991. The marijuana was in Guerra's possession and was supposed to be delivered to Caudill, but Caudill's storage area had been raided by the police. Caudill met Guerra and told him about the raid. Guerra contacted Olvera and was told to wait.

Subsequently, Caudill was telephoned and told to "just take the produce." Later, Guerra was introduced to Martinez as the person who was going to transport the marijuana to Florida. Guerra delivered the marijuana to Martinez at Radco Farms and loaded the marijuana into the truck as Martinez watched. Guerra gave Martinez the bill of lading for the boxes loaded onto the truck. Guerra and Ramirez then followed Martinez's truck until it was apprehended by the police. This evidence established beyond a reasonable doubt that both Guerra and Martinez had actual possession of the marijuana. We have previously affirmed the sufficiency of the evidence to support Ramirez's conviction under the conspiracy count.

Caudill did not dispute that he was a member of the conspiracy, but contends on appeal that the district court did not properly instruct the jury with respect to convicting him for the conduct of his co-

conspirators. In United States v. Alvarado, 898 F.2d 987, 993 (5th Cir. 1990), the Court held that an instruction to the jury "as to the effect of an agency relationship, and to the fact that each co-conspirator acts as the agent of the others when acting in further of the conspiracy" was sufficient to allow a defendant to be convicted for the substantive offenses of his co-conspirators. The Court specifically held that it was not necessary to specifically instruct the jury using the language of Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). In this case, the district court gave a sufficient jury instruction. Therefore, there was sufficient evidence to uphold all three defendants' convictions for possession with intent to distribute marijuana.

Martinez claims that the district court erred in limiting his opening statement and his cross-examination of Guerra. During the

opening statement, the district court prevented counsel from telling the jurors what Guerra's potential sentence would have been. Counsel argued that the purpose of this statement was to show that Guerra was motivated to lie. Although the district court did not allow counsel to go into specific sentences, the court he did allow counsel to discuss the issue of Guerra's credibility related to a promise of a reduced sentence. On appeal, the only argument put forward to support this contention is that "defense attorney Connors was prevented from telling the jury Mr. Javier Guerra's reasons for lying." No argument has been made that it was necessary to tell the jury of Guerra's exact potential sentence in order to show that he was lying. Martinez has not shown any error because the record shows that counsel was allowed to argue to the jury that Guerra was lying in exchange for a reduced sentence. See United Stats v. Frascone, 747

F.2d 953, 958 (5th Cir. 1984) (no evidence to show that district court unduly restricted defense's closing argument).

On cross-examination of Guerra, the district court would not allow counsel to ask Guerra to draw a legal conclusion about his brother's involvement in the conspiracy. The purpose of the line of questioning was to challenge Guerra's credibility by showing that Guerra was motivated to testify against the defendants to prevent his brother from going to prison. The district court has broad discretion in limiting the scope and extent of cross-examination. United States v. Bryant, 991 F.2d 171, 175 (5th Cir. 1993). The record shows that the district court allowed counsel to fully explore the involvement of Guerra's brother in the drug conspiracy, including that the charges against him were dismissed at the request of the Government. On appeal, the defendants have not shown that the question prohibited

by the district court would have been relevant to or probative of Guerra's credibility in the light of the evidence that was brought out on cross-examination. See Bryant 991 F.2d at 175. No abuse of discretion has been shown.

Martinez and Ramirez also argue that the district court abused its discretion by refusing to allow an audio tape and a transcription of the tape into evidence because the tape was inaudible and the recording untrustworthy. Such decisions of the district court are reviewed for abuse of discretion. United States v. Nixon, 777 F.2d 958, 973 (5th Cir. 1985). "In this circuit, '[t]ape recordings which are only partially intelligible are admissible unless these portions are so substantial as to render the recording as a whole untrustworthy.'" Id. (quoting United States v. Ruppel, 666 F.2d 261, 272 (5th Cir.), cert. denied, 415 U.S. 991 (1974)). On appeal, Martinez and Ramirez

have not argued that the tape was audible or trustworthy. Further, they have not argued with any specificity as to the probative value of the tape. The defendants have not established that the district court abused its discretion in not admitting the audio tape or a transcription thereof.

Martinez and Ramirez contend that the district court failed to give proper jury instructions on eight separate issues.

> Failure to deliver an instruction constitutes reversible error when three conditions exist:
>
> (1) the instruction is substantially correct;
>
> (2) It is not substantially covered in the charge actually given the jury; and
>
> (3) It concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present a given defense effectively.

United States v. Liu, 960 F.2d 449, 453 (5th Cir.), cert. denied, 113 S.Ct. 418 (1992).

The defendants claim that the jury should have been instructed: 1) that the United States attorney decides if a defendant should be prosecuted; 2) as to the essential elements of lying to a government official; 3) as to the essential elements of money laundering; and 4) as to the sentencing guidelines applicable to Guerra's case. These requested instructions have no relevance whatsoever to the issues to be decided by the jury in this case or to the evidence presented at trial. On appeal, no showing has been made that these instructions were even correct, much less warranted. Liu, 960 F.2d at 453.

The defendants contend that the jury should have been instructed that the mere fact that the marijuana was found in Martinez's truck did not mean he had possession of the drugs. The district court instructed the jury on both actual and constructive possession. The district court

specifically instructed the jury that a person must knowingly have either direct physical control of something or knowingly exercise dominion or control over it in order to have possession. This is substantially the instruction that the defendants requested. See Liu, 960 F.2d at 453.

The defendants requested the judge to instruct the jury on the methods of proving knowledge; however, the district court declined to give that instruction saying that it was argument. The district court did instruct the jury that "the wording 'knowingly' as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally and not because of mistake or accident." A district court's refusal to elaborate on a correct instruction is an abuse of discretion only if the refusal prevented the jury from considering the defendants' defense. United States v.

Ramirez-Rizo, 809 F.2d 1069, 1071 (5th Cir. 1987). The record shows that counsel argued vehemently that Martinez had no knowledge that the marijuana was in his truck. Taking the district court's instruction together with counsel's argument shows that the defense was adequately submitted to the jury. Ramirez-Rizo, 809 F.2d at 1071-72. On appeal, no specific argument has been made to the contrary.

The defendants also argue that the district court should have supplemented the instructions on the general subject of witness credibility with an instruction as to prior inconsistent statements of a witness. Defendants have not suggested that the general instruction was not correct, nor have they shown how the failure to give this instruction deprived them of presenting the defense that Guerra was lying. See Ramirez-Rizo, 809 F.2d at 1071-72.

The defendants argued that the district

court did not give an instruction on specific intent; however, this instruction was given. See Liu, 960 F.2d at 453.

The main defense in this case was that Guerra was lying in exchange for a favorable deal from the Government. Guerra's credibility was the subject of a specific instruction. The district court instructed the jury that Guerra was a named codefendant in the indictment and that he had entered into a plea agreement providing a lesser sentence than he would have otherwise been exposed to. Further, the district court instructed the jury "that such testimony is always to be received with caution and great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt."

In addition to this instruction, the record contains the evidence of the agreement between Guerra and the Government and the

argument of counsel calling Guerra a liar. Taking all of this together, the "key consideration" in assessing the propriety of instructions to the jury, that the jury was allowed to consider the defense that Guerra was lying in order to receive a lighter sentence, was satisfied. See Ramirez-Rizo, 809 F.2d at 1071-72 (citing United States v. Rhodes, 569 F.2d 384, 389-90 (5th Cir.), cert. denied 439 U.S. 844 (1978)). Therefore, the defendants have not demonstrated any reversible error with respect to the instructions either given or not given to the jury. Lin, 960 F.2d at 960.

Additionally, Caudill argues that the district court was clearly erroneous in sentencing him based on 3,729.5 pounds of marijuana. Caudill argues that he is responsible for 2,500 pounds, but argues that he did not know about the quantity of marijuana contained in the second shipment. Factual findings in this area are subject to

reversal only if they are clearly erroneous. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992).

Guerra's testimony was that Caudill was prepared to transport the second load of marijuana, but did not do so because his storage area had been raided by the police. The delivery was to take place on the same day that the raid occurred. It is not clearly erroneous to conclude from this testimony that Caudill knew the amount of marijuana he was to receive and transport.

Finally, Caudill argues that the district court did not adequately explain its reasons for sentencing him to 140 months of imprisonment. The guideline range that Caudill fell into was greater than 24 months and in that case, the district court is obliged to state the reasons for imposing a sentence at a specific point in the range. See 18 U.S.C. § 3553(c)(1); United States v. Fair, 979 F.2d 1037, 1041 and n.3 (5th Cir.

1992). The district court stated that it sentenced Caudill because the drug transaction was a very large, Caudill was very seriously involved in it, and Caudill denied his involvement in the transaction. Caudill has not suggested how the reasons were insufficient to support the 140-month sentence.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7046

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON MARTINEZ, RODOLFO RAMIREZ
and JAMES CAUDILL,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Texas

ON PETITION FOR REHEARING

(October 20, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing, as to Ramon Martinez and Rodolfo Ramirez, filed in the above entitled and numbered cause be and the same is hereby

DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA

V.

RAMON MARTINEZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: M-91-072-S2-01

Joseph A. Connors III
Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____.

X was found guilty on count(s) 1 and 2 of the Superseding Indictment on October 17, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1), and 841(b)(1)(B) and 21 USC 841(a)(1), 841(b)(1)(B), and 18 USC 2	Conspiracy to possess with intent to distribute, more than 100 kilograms, but less than 1000 kilograms of marihuana.	02/08/91	1
	Possession with intent to distribute, more than 100 kilograms, but less than 1000 kilograms, that is, approximately 1,249 pounds (gross) weight of marihuana.	02/08/91	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

___ Count(s) _____ (is) (are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100, for count(s) 1 and 2, which shall be due X immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 454-68-3807

Defendant's Date of Birth: 01/03/46

Defendant's Mailing Address:

2128 Oakland Avenue
McAllen, Texas 78501

Defendant's Residence Address:

_____

_____

December 17, 1991
Date of Imposition of Sentence

/s/ Ricardo H. Hinojosa
Signature of Judicial Officer

Honorable Ricardo H. Hinojosa
U.S. District Judge
Name & Title of Judicial Officer

12/23/91
Date

Defendant: RAMON MARTINEZ
Case Number: M-91-072-S2-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ninety-seven (97) months as to each of Counts 1 and 2, said imprisonment terms to run concurrently.

___ The court makes the following recommendations to the Bureau of Prisons:

_X_ The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district,
___ at _____ a.m. / p.m. on _____.
___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
___ before 2 p.m. on _____.
___ as notified by the United States marshal.
___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on 1/23/92 to FCI-Seagoville at Seagoville, Tx. 75159, with a

certified copy of this judgment.

R.G. Thompson Warden
United States Marshal

By /s/ G. Hill
Deputy Marshal

SUPERVISED RELEASE

Upon Release from imprisonment, the defendant shall be on supervised release for a term of four (4) years as to each of Counts 1 and 2, said Supervised Release Terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the

defendant shall not commit another federal, state, or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or

administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: RAMON MARTINEZ
Case Number: M-91-072-S2-01

STATEMENT OF REASONS

___ The court adopts the factual findings and guideline application in the presentence report.

OR

_X_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): **Paragraph #34**

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: III

Imprisonment Range: 78 to 97 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 12,500 to $ 2,000,000

_X_ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

___ Full restitution is not ordered for the following reason(s):

_X_ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to

depart from the sentence called for by application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s):

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA

V.

RODOLFO RAMIREZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: M-91-072-S2-02

Aron Pena
Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____.

X was found guilty on count(s) 1 and 2 of the Superseding Indictment on October 17, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1) & 841(b)(1)(B) 21 USC 841(a)(1), 841(b)(1)(B) & 18 USC 2	Conspiracy to possess with intent to distribute, more than 100 kilograms, but less than 1,000 kilograms of marihuana.	2/08/91	1
	Possession with intent to distribute, more than 100 kilograms, but less than 1,000 kilograms, that is approximately 1,249 pounds (gross) weight of marihuana.	2/08/91	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

___ Count(s) _____ (is) (are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100, for count(s) 1 and 2, which shall be due X immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 464-13-0500

Defendant's Date of Birth: 08/15/60

Defendant's Mailing Address:

497 Avenida Del Sol
Brownsville, Texas 78521

Defendant's Residence Address:

_____

_____

December 17, 1991
Date of Imposition of Sentence

/s/ Ricardo H. Hinojosa
Signature of Judicial Officer

Honorable Ricardo H. Hinojosa
U.S. District Judge
Name & Title of Judicial Officer

12/23/91
Date

Defendant: RODOLFO RAMIREZ
Case Number: M-91-072-S2-02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of seventy (70) months as to each of Counts 1 and 2, said imprisonment terms to run concurrently.

___ The court makes the following recommendations to the Bureau of Prisons:

_X_ The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district,
- ___ at _____ a.m. / p.m. on _____.
- ___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
- ___ before 2 p.m. on _____.
- ___ as notified by the United States marshal.
- ___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ **to**

_____,

with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: RODOLFO RAMIREZ
Case Number: M-91-072-S2-02

SUPERVISED RELEASE

Upon Release from imprisonment, the defendant shall be on supervised release for a term of four (4) years as to each Counts 1 and 2, said Supervised Release Terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the

defendant shall not commit another federal, state, or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or

administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: RODOLFO RAMIREZ
Case Number: M-91-072-S2-02

STATEMENT OF REASONS

___ The court adopts the factual findings and guideline application in the presentence report.

OR

_X_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): **Paragraphs 28, 31 and 35.**

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: I

Imprisonment Range: 70 to 87 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 12,500 to $ 2,000,000

_X_ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

___ Full restitution is not ordered for the following reason(s):

_X_ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to

depart from the sentence called for by application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s):

14R p. 915, lines 8-10

The next thing that I need to discuss with you all is your suggested or requested jury instructions. Mr. Connors?

MR. CONNORS: Yes, Your Honor.

* * * * *

14R p. 917, lines 2-4

Method approving (sic) knowledge with regards to page 8. The Court will not give that instruction. The Court feels that's more in the nature of jury argument on y'all's parts.

* * * * *

15R p. 921, lines 1-25

THE COURT: Mr. Connors, this is your second requested jury instructions?

MR. CONNORS: Yes, Your Honor.

THE COURT: Why even bother to present these?

MR. CONNORS: Well, on the very first one you asked if Ms. Booth and I could get together and rewrite that first one.

THE COURT: Okay. Well, that one I understand that. Did

y'all agree on that one?

MR. CONNORS: I don't have an agreement yet. I -- I -- I --

MS. BOOTH: I don't have -- I -- I -- Your Honor, ongoingly I would rather we just used the pattern jury instruction book.

THE COURT: I know. But what he's asking is the line of cases that say that just the fact that you're there is not enough.

MS. BOOTH: And there's certainly a mere presence instruction in the Court's instructions, Your Honor. That you give under conspiracy and under aiding and abetting. It's hit twice, I believe, Your Honor.

THE COURT: Right. But he is --

MS. BOOTH: There'd be no need --

THE COURT: -- he is entitled to this. I will probably throw it in the mere presence portion.

MS. BOOTH: Yes, sir.

15R p. 922, lines 1-10

THE COURT: And -- it may be -- I --- I will give it the way it is here.

The prosecution. Para -- Page 3, denied.

False statement instruction on Page 4, denied.

The money laundering instruction on Page 5, denied.

The Federal Sentencing Guideline instruction request on Page 6, denied.

I will go out -- and we will go ahead and bring the jury in.

BAILIFF: All rise.

FORMAL OBJECTIONS TO JURY CHARGE

15R p. 1000, lines 22-25

Those are all my instruction, Ladies and Gentlemen. I'm going to ask you to step outside for just a second while I briefly visit with the attorneys in the case. Please rise for the jury.

15R p. 1001, lines 1-25

(Jury exits)

THE COURT: Mrs. Booth do you have any additions or corrections or objections to the Court's instructions?

MS. BOOTH: Your Honor, maybe I didn't hear it. But I didn't hear the co-conspirators liability instruction. I -- I --

THE COURT: I didn't get it.

MS. BOOTH: That's my only addition, Your Honor.

(Pause)

THE COURT: I think it was made pretty clear with the aiding and abetting, Mrs. Booth.

MS. BOOTH: Yes, sir.

THE COURT: And we'll just -- I'm -- I'm sorry. I mean, that was my fault. I told you I would give it. We didn't discuss

it again this morning. There was no need for us to discuss it again. And I should have given it. And I didn't. And at -- at this point I just think it would be a problem.

MS. BOOTH: Yes, sir.

THE COURT: Mr. Connors? Other than the fact that you'd like to re-urge the ones that I didn't give that you gave, those have been denied. If they haven't been given. Is there any other objection, correction or addition to the Court's instructions?

MR. CONNORS: I just want to take up one of those. But if it's the same ruling than it's --

THE COURT: The same ruling. It's not going to change.

15R p. 1002, lines 1-18

MR. PENA: We join in that, Your Honor.

THE COURT: I -- I don't really know what you're joining in Mr. Pena, because you haven't joi --

MR. PENA: Sir, the request that the request instructions that were denied.

THE COURT: Well, you really haven't -- you didn't request them beforehand.

MR. PENA: Well, I thought

Judge, we didn't have to duplicate them.

THE COURT: You did have to. Okay. Mr. Layer?

MR. LAYER: I have nothing.

THE COURT: Okay. Your oral request is denied at the present time, Mr. Pena. If you were joining in on his. If I didn't give them, they're denied.

Go ahead and bring the jury back in.

MR. CONNORS: Judge, we're still working on the exhibits, we're almost done.

(Jury enters)

COURT'S JURY INSTRUCTIONS

15R p. 972, lines 21-25

> Ladies and gentlemen, you've heard all the evidence in the case, as well as the closing arguments in the case. It's my job therefore right now to instruct you on the rules of law that you have to follow and apply in arriving at your decisions in the case. Your verdicts in the case.
>
> * * * * *

15R p. 973, lines 7-16

> In any -- and -- and the law is very important because you have to follow the law as I give it to you so please do make an effort to listen closely. Which you have been during the entire trial.
>
> In any jury trial, Ladies and Gentlemen, there is in effect two judges. I'm one of them and everybody knows that. I sit up here and preside over the trial and determine what evidence is relevant under the law for your consideration. And at the end of the case it's my job to instruct you on the law that applies in the case and that's what I'm doing now.
>
> * * * * *

15R p. 974, lines 3-10

> You have to follow all of the instructions as a whole, as I said a little while ago. You have no

right to disregard or to give special attention to any one instruction or to question the wisdom or correctness of any rule of law that I may give you. In other words, you cannot substitute your own notion or your own opinion as to what the law is or what it ought to be. It's your duty to apply the law as I give to you. Regardless of the consequences.

* * * * *

15R p. 976, lines 14-25

As I said, remember that any statements, objections, or arguments, made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case. And in so doing to try to call your attention to something that they think you might have forgotten or might otherwise escape your notice. But in the end, in the final analysis, it is your own recollection. And your own interpretation of the evidence which controls in the case. What the attorneys say is not binding on you.

Also, during the course of a trial, I will occasionally make comments to the attorneys. Or ask questions

15R p. 977, lines 1-9

of a witness. Or admonish a witness concerning the manner in which he or she should respond to the questions being asked. But do not assume from anything that I may have said or done that I have any opinion as to the facts in the case. Except for my instructions to you on the law, you should disregard anything that I may have said or done in deciding what the facts are in the case. In other words, what I'm saying here is your verdict. Your decisions as to the facts should be strictly your decisions and not what you think somebody else might think about it.

* * * * *

15R p. 979, lines 16-25

And yes, a witness may be discredited or impeached by contradictory evidence. By showing that a witness testified falsely concerning a material matter. Or by evidence that at some other time the witness has said or done something which is inconsistent with the witness' present testimony. And if you believe that any witness has been so impeached then it is your exclusive decision to give the testimony of that witness such weight or credibility of any -- as you may think it deserves.

The fact that a witness has been previously

15R p. 980, lines 1-6

convicted of a felony, including through a plea of guilty, is also a factor that you may consider in weighing the credibility of a witness. The fact of such a conviction does not necessarily destroy the witnesses credibility. But it is one of the circumstances you may take into account in determining the weight to be given to the witness' testimony.

* * * * *

15R p. 981, lines 18-25

Ladies and Gentlemen, in this case the Government did call as one of its witnesses an alleged accomplice. Mr. Javier Guerra, named as a co-defendant in the indictment. With whom the Government has entered into a plea bargain agreement providing for the dismissal of some charges and a lesser sentence than he would be exposed to for the offense to which he pled guilty. Or for immunity from other charges, or for a promise that they might make a recommendation with regards to a

15R p. 982, lines 1-15

lesser sentence. Such plea bargaining, as it's called, has been approved as lawful and proper. And it is expe -- expressly provided for in the rules of the court. An alleged accomplice -- including one who has entered into a plea bargain agreement with the

Government, does not thereby by doing that become incompetent as a witness. On the contrary. The testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. However, you should keep in mind that such testimony is always to be received with caution and great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt. And the fact that an accomplice has entered a plea of guilty on the offense charged in the indictment is not evidence in and of itself of the guilt of any other person in the case, Ladies and Gentlemen.

* * * * *

15R p. 988, lines 2-25

Possession. Well, there isn't ev -- any evidence here that anybody actually was holding any marijuana and you have the three defendants that are being charged here. The law, though, recognizes two kinds of possession. As its used in the statutes and in these instructions and in the indictment. The law recognizes, as I said, two kinds of possession. Actual possession and constructive possession.

A person who knowingly has direct physical control of something at a given time is in actual possession of it. Let's say with regards to this pencil. Right

now I'm in actual possession of it. I have direct physical control over it. I'm holding it in my hand.

The other kind of possession is constructive possession and that's defined as follows: A person who although not in the actual possession of something, knowingly has both the power and the intention at a given time to exercise dominion or control over something either directly or through another person or persons is in constructive possession of it. I am in constructive possession of this very same pencil right now. I'm still in possession of it under the law. Although I'm not holding it. Why is that? Because it falls under the definition of constructive possession. I knowingly have both the power and the intention right now to exercise dominion or control over it. Either directly, by eventually picking it up myself or through

15R p. 989, lines 1-25

another person by asking someone when I go into my office -- can you go up there and pick my pencil up that I left on the bench. And I would exercise constructive possession over it -- over it. The other example that I used to use, and I haven't used in a long time. I've got a Labrador Retriever who's name is Justice. She's about two and a half years old. She stays inside my house. I don't presently have her with me so I'm not holding

her so I don't have actual possession over her. But -- but I have constructive possession of that dog. Because right now I both have the power and the intention to exercise dominion or control over her. She doesn't listen much, but I both have the power and the intention to do that.

(Chuckling)

I'll either do it myself by going at Noon to walk her or if at -- at any point I wanted to give somebody the key to my house. I'd say go take care of this dog. I'd be exercising constructive possession of her through someone else.

As I said, the law also recognizes that in addition to constructive or actual possession that it may be sole or joint. If one person alone has actual or constructive possession of some things, obviously possession is sole. If two or more persons share actual or constructive possession of something, possession is joint. You can have more than one person have actual or constructive possession of something.

You may find that the element of possession -- as

15R p. 990, lines 1-25

that term is used in these instructions -- is present. If you find beyond a reasonable doubt that the defendant under consideration had actual or constructive possession either alone or jointly with someone else.

With regards to Count Two, the last statute quoted here 18 U.S. Code, Section 2. The Government is alleging that -- that was violated with regards to Count Two. That you can find a defendant guilty under that statute with regards to Count Number Two as the Government's allegation in this indictment through the Grand Jury.

18 U.S. Code, Section 2 in the United States -- and this applies to Count Number Two -- is known as the aiding and abetting statute. What does that mean? It means that in the United States the guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the alleged offense. This law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through the direction of another person as his agent, or by acting in concert with, or under the direction of another person or persons in a joint effort or enterprise. Title 18, U.S. Code, Section 2 reads as follows: It says: Whoever commits an offense against the United States or aids, abets, counsels,

commands, induces, or procures its commission is punishable as a principal. Whoever willfully causes an act to be done, which if directly performed by him or another would

15R p. 991, lines 1-25

be an offense against the United States, is punishable as a principal.

So, under this statute, if the acts or conduct of an agent, employee, or other associate of the defendant, are willfully directed or authorized by that defendant or if the defendant aids and abets another person by willfully joining together with that person -- with such person in the commission of the crime, then this law -- the aiding and abetting statute -- holds that defendant responsible for the acts and conduct of such other persons just as though he the defendant had committed the acts or engaged in such conduct himself.

Notice, however, that before any defendant may be held criminally responsible for the acts of someone else, it is necessary that the defendant willfully participate in it as he would in something he wishes to bring about. And that he willfully associated himself and willfully participated in it as I said in -- and it's something he wishes to bring about. That is to say that he willfully seeked by some act or omission of his to make the criminal venture

succeed.

And, of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime. Unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. In other words you cannot find any defendant guilty

15R p. 992, lines 1-9

unless you find -- under the aiding and abetting statute -- unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions with regards to Count Number Two was committed by some person or persons. And that the defendant willfully participated in that commission.

* * * * *

15R p. 995, lines 5-25

I will say again that mere presence at the scene of an event, even with knowledge that a crime is being committed, or with mere fact, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common names and interests, does not necessarily establish proof of the existence of a conspiracy. Also a person has no knowledge of a conspiracy but who

happens to act in a way which advances some purpose of a conspiracy does not thereby become a conspirator.

You will note, and I've only got about three minutes left here. I'm almost done. You will note that the indictment charges the offenses were committed on or about a certain date or that they allurged -- alleged certain amounts. The proof need not establish with certainly the exact date of the alleged offense, nor the exact amount. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed in a date reasonably near the date alleged and that the amount was one reasonably near the amount alleged.

The word "knowingly" as that term has been used from time to time in these instructions, means that the act was

15R p. 996, lines 1-25

done voluntarily and intentionally and not because of mistake or accident.

You may not find the defendant knowingly possessed marijua -- or committed one of the offenses charged in the indictment based solely on a finding that a defendant may have had control of a vehicle in which marijuana was concealed. In order to find such a defendant acted knowingly in

addition to mere presence on his part or in the vehicle, there must be additional independent facts and circumstances which affirmatively link the defendant to the hidden contraband.

The word "willfully" as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids. That is to say with bad purpose, either to disobey or disregard the law.

The crimes charged in this case are serious crimes. And they do require proof of specific intent before a defendant can be convicted. "Specific intent" as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove a defendant knowingly did an act which the law forbids purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

And an act or a failure to act is knowingly done if done voluntarily and intentionally and not because of mistake

15R p. 997, lines 1-25

or accident or other reason. Or other innocent reason.

As I said before, Ladies and

Gentlemen, a separate crime or offense is charged against one -- against each one of the defendants in each count of the indictment. As I said when we started, each offense and the evidence pertaining to it should be considered separately. The case of each defendant should be considered separately and individually. The fact that you may find one or more of the defendants guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant, Ladies and Gentlemen.

I also caution you that you're hear to determine whether a defendant is guilty or not guilty from the evidence in this case. None of the defendants are on trial for any act or conduct or offense not alleged in the indictment. You are also not being called upon to return a verdict of guilty or not guilty as to any other person who is not on trial in this case at the present time -- as a defendant in this case.

I also want you to know that the punishment provided by the law for each one of these offenses in federal court is a matter decided by the judge. And you cannot -- cannot in any way consider that in making your decision as to whether a person is guilty or not guilty. You cannot consider the issue of punishment in federal court. That is a matter strictly for the judge of the law and you cannot decide anything with regards to that and

cannot base your verdict of guilty or not guilty in

15R p. 998, line 1

consideration of that.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA

VS. CRIMINAL NO. M-91-72-S2

RAMON MARTINEZ

DEFENDANT'S REQUESTED JURY INSTRUCTIONS

RAMON MARTINEZ, the accused herein, pursuant to Rule 30, F.R.Cr.P., timely requests inclusion in the Court's charge to the jury of the following pages numbered 2 through 18 (a copy of which was given to the Assistant U.S. Attorney on this case).

Respectfully submitted by
Defense attorney,

/s/ J. A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
P.O. Box 5838
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

CERTIFICATE OF SERVICEE

I, Joseph A. Connors III, certify that I had delivered or mailed a copy of the foregoing to the office of all attorneys of record on this the 10th day of October, 1991.

/s/ J. A. Connors III
JOSEPH A. CONNORS III

* * * * *

METHOD OF PROVING KNOWLEDGE

Your decision whether the defendant knew the materials he possessed were a controlled substance involves a decision about the defendant's state of mind. It is obviously impossible to prove directly the operation of the defendant's mind. But a wise and intelligent consideration of all the facts and circumstances shown by the evidence and the exhibits in the case may enable you to infer what the defendant's state of mind was.

In our everyday affairs, we are continuously called upon to decide from the actions of others what their state of mind is. Experience has taught us that, frequently, actions speak louder and more clearly than spoken or written words. Therefore, you may well rely in part on circumstantial evidence in determining the defendant's state of mind.

For example, if the defendant was the

sole occupant of an apartment, it is reasonable to conclude that the defendant knew about items in the apartment. The defendant's behavior may also indicate knowledge. Nervousness in the presence of the drugs or flight from the site at which authorities have identified drugs may indicate that the defendant knew that the materials in question were narcotics. It is up to you, based on all the evidence, to determine whether the defendant knew that he possessed narcotics.

For authority, see 2 Modern Federal Jury Instructions at 56-18 (Matthew Bender 1991)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA

VS. CRIMINAL NO. M-91-72-S2

RAMON MARTINEZ

DEFENDANT'S SECOND REQUESTED JURY INSTRUCTIONS

RAMON MARTINEZ, the accused herein, pursuant to Rule 30, F.R.Cr.P., timely additionally requests inclusion in the Court's charge to the jury of the following pages numbered 2 through 6 (a copy of which was given to the Assistant U.S. Attorney on this case).

Respectfully submitted by
Defense attorney,

/s/ J.A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
P.O. Box 5838
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

CERTIFICATE OF SERVICE

I, Joseph A. Connors III, certify that I had delivered or mailed a copy of the foregoing to the office of all attorneys of record on this the 17th day of October, 1991.

/s/ J.A. Connors III
JOSEPH A. CONNORS III

CONTROL OF VEHICLE (2nd Version)

You may not find a Defendant "knowingly" possessed marijuana based solely on a finding that he had control of the vehicle in which marijuana was concealed. In order to find such a Defendant acted "knowingly", in addition to mere his presence in the vehicle, there must be additional independent facts and circumstances which affirmatively link the accused to the hidden contraband.

2

PROSECUTION

The Executive branch of the Government acting through the United States Attorney for the Southern District of Texas has the exclusive right to decide whom to seek charges against and whom to prosecute and try for alleged involvement in criminal conduct.

FALSE STATEMENT

All of the essential elements of 18 U.S.C. 1001, the false statement crime, since Javier Guerra has admitted to often orally lieing to S/A Armando Gonzalez on or about March 8, 1991. This goes to a possible ground of impeachment since as a benefit of his plea bargain and cooperation, he will not apparently be prosecuted for these violations of 18 U.S.C. 1001.

4

MONEY LAUNDERING

As applicable to Javier Guerra and possible grounds for impeachment of him, please explain all of the essential elements of 18 U.S.C. 1956, the money laundering crime, for he has described the receipt and use of drug proceeds to hire the attorneys and pay his bond in this case in this Court in the S-1 indictment. This goes to a possible ground of impeachment since as a benefit of his plea bargain and cooperation, he will not apparently be prosecuted for these violations of 18 U.S.C. 1956.

FEDERAL SENTENCING GUIDELINES

As applicable to Javier Guerra and possible grounds for impeachment of him, please explain all the applicable Federal Sentencing Guidelines, especially insofar as this cooperating Co-Defendant and now government witness testified in an effort to obtain a prosecution request at sentencing for a judicial downward departure at sentencing below the legislature's statutory mandatory minimum term of incarceration of at least 60 months or 120 months applicable to the offense to which Javier Guerra pled guilty to count one of M-91-72-S1 in this very District Court on July 3, 1991.

The Court should note that the probation officer has apparently complied with this Court's orders and filed a pre-sentence report as to Javier Guerra before the first sentence setting previously continued by this District Court.

NO. 92-7046)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPEAL OF CRIMINAL NOS.
M-91-072-S2-01 AND 07

IN THE UNITED STATES DISTRICT COURT
S O U T H E R N DISTRICT OF TEXAS

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

RAMON MARTINEZ AND RODOLFO RAMIREZ,
Defendants-Appellants

APPELLANTS' FIRST MOTION FOR REHEARING

Ramon Martinez and Rodolfo Ramirez, the above appellants, move the Court to rehear the above cause. As grounds, appellants show:

REHEARING POINT OF ERROR NO. 1

As to R. Ramirez' point of error no. 2, the Court appears to fail to resolve that

issue. See Opinion at pgs. 4-7, especially at p. 7. This omission was reversible error.

ARGUMENT

Appellant Ramirez objects to that judicial omission, since he is serving a sentence on a conviction for which he has not received his statutory right of judicial appellate review and resolution.

REHEARING POINT OF ERROR NO. 2

As to R. Martinez' point of error no. 4, see Opinion at pgs. 8-10, the Court has completely failed to note the issue and to judicially resolve same, although R. Martinez argued (Appellants' Brief at 42-43):

> During Javier Guerra's cross-examination by defense attorney Connors, Mr. Connors was prevented from letting the jury know that Mr. Guerra had committed a federal offense by lying to a federal officer, that Mr. Guerra's sentence should have even between 78 and 90 months and that it was possible that Javier may have previously said that Mr. Ramon Martinez may not here known about the marihuana (9R 376-379; 387-392; 404-409).

REHEARING POINT OF ERROR NO. 3

As to R. Martinez and R. Ramirez' point of error no. 5, see Opinion at pgs. 9-10, the Court points out:

> "On appeal, Martinez and Ramirez have not argued that the tape was audible or trustworthy. Further, they have not argued with any specificity as to the probative value of the tape."

ARGUMENT

Although appellants did not appellately argue the magic words "the tape was audible or trustworthy", appellants provided the appeals court with DE 1A (see Record Excerpts at Tab 11) the true transcript of the audible and relevant portion of the tape. Appellants still believe that is sufficient to show this Court the tape was partially audible and had a relevant part. As to the specific probative value of the tape, appellants' argued (Appellants' Brief at 42-43):

> During Javier Guerra's cross-examination by defense attorney Connors, Mr. Connors was prevented from letting the jury know that Mr. Guerra had committed a federal

> offense by lying to a federal officer, that Mr. Guerra's sentence should have even between 78 and 90 months and that it was possible that Javier may have previously said that Mr. Ramon Martinez may not here known about the marihuana (9R 376-379; 387-392; 404-409).
>
> *****
>
> In the instant case, all defense counsel was trying to do was to show the jury what was motivating Mr. Guerra to lie. The district court did not allow defense counsel to do so. The accuracy and truthfulness of Mr. Guerra's testimony was the key to Mr. Martinez's and Mr. Ramirez's conviction. Defense counsel should have been allowed full cross-examination, including the use of the tape recording transcribed by defense counsel. It was for the jury, not the district court to decide what Mr. Guerra was saying. The jury may have well decided that Mr. Guerra took it upon himself to implicate Mr. Ramirez.

Thus, by providing this Court with an accurate bilingual transcript of the audible portions of the tape recording, appellants' counsel hoped and believed that the Court was thus made aware (by Record Excerpts Tab 11) these appellants were claiming the tape was audible and trustworthy. Otherwise if not

audible or trustworthy, there would be no transcript of the tape relevant portions which had such probative value as to Guerra's personal decision to implicate Mr. Ramirez and Mr. Martinez, since Mr. Martinez "has nothing to do with it."

REHEARING POINT OF ERROR NO. 4

As to points of error nos. 7 through 9 and 13, the Court fails to deal with appellants' contention that those requested jury instructions dealt with law issues the jury needed to know to accurately analyze Javier Guerra's credibility based on the full consequences of all the deal Guerra received by cooperating with the Government. Compare Opinion at pgs. 12-13.

ARGUMENT

In their brief appellants argued at pgs. 47-48:

> Since there was little other substantive evidence other than Javier Guerra's testimony to prove Mr. Martinez's or Mr. Ramirez's guilt, it was imperative that they be allowed the opportunity to

dispute the credibility of Javier Guerra. Mr. Guerra lied to agent Gonzalez on more than one occasion. The jury had every right to know that lying to a federal officer was a federal offense, and Mr. Guerra was not so charged by the Government because the Government chose not to charge him. The jury also had every right to know that Mr. Guerra was also guilty of the offense of money laundering and that he was not so charged because the Government chose not to charge him. The jury also had every right to know about what kind of sentence Mr. Guerra was avoiding by pleading guilty and assisting the Government in his "testimony". All this had a bearing on Javier Guerra's credibility to show any motive Mr. Guerra had to lie, and the jury had every right to know that there was plenty to lie about.

POINT OF ERROR NO. 5

As to Appellants' Point of Error No. 11, appellants R. Martinez and R. Ramirez were denied constitutional due process in this case for the trial court refused to instructed the jury "on the methods of proving knowledge," although the jury was in effect told the law only comes from the trial court and what the lawyers say "does not count if different from the judge's law," and

then the Court of Appeals found (Opinion at p. 11) in effect that defense counsel in lieu of the trial court effectively instructed the jury on the law "on the methods of proving knowledge".

ARGUMENT

The Court of Appeals finds (Opinion at p. 11):

> Taking the district court's instruction together with counsel's argument shows that the defense was adequately submitted to the jury. Ramirez-Rizo, 809 F.2d at 1071-72.

Appellants Martinez and Ramirez submit that it is a denial of due process on appeal for the appellate court to find the trial court's instructions together with counsel's argument show that the defense of no knowledge was adequately submitted to the jury and either no harm occurred or harmless error occurred when the trial court refused to submit proper jury "knowledge" instructions requested by appellant Martinez and concurred in by appellant Ramirez. Since

the jury only receives the applicable law from the court, appellants were denied due process in the trial court when the trial judge failed to instruct the jury as requested in appellant Martinez' requested jury instruction as to the method of proving knowledge.

Appellants conclude that it is a violation of due process for the trial judge to deny proper jury instructions and for the appellate court to say there is no error because the defense lawyer argued that same law which the judge omitted from instructing the jury on. Appellant recognizes that this panel of the Court of Appeals must follow prior precedent. So unless this case is taken en banc, this panel will likely follow prior precedent, unless the constitutional problem remains unaddressed by prior circuit precedent. Compare United States v. Fooladi, 746 F.2d 1027, 1031-32 (CA5 1984), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84

L.Ed.2d 382 (1985) [where the district court erred in not instructing on a defensive theory, for the trial judge's imprimatur on a defensive theory is important; but the defendant's "conviction was saved by circumstance that his case was fully developed and argued to the jury--ironically because he was well defended"].

CONCLUSION

For the foregoing reasons, Mr. Martinez and Mr. Ramirez request this appeals court to rehear the cause, to reverse the convictions and order judgments of acquittal or new trials.

Respectfully submitted today September 30, 1993.

Respectfully submitted by
Appellants' Attorney,

/s/ J.A. CONNORS III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

CERTIFICATE OF SERVICE

I, **JOSEPH A. CONNORS III**, hereby certify that on the 30th day of September, 1993, three true copies of the foregoing Appellants' First Motion for Rehearing was mailed to Assistant United States Attorney, Ms. Paula C. Offenhauser at Appellate Division P.O. Box 61129, Houston, Texas 77208-1129; and one true copy thereof to each Appellant.

/s/ J.A. CONNORS III
JOSEPH A. CONNORS III

NO. 92-7046

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPEAL OF CRIMINAL NOS.
M-91-072-S2-01 AND 07

IN THE UNITED STATES DISTRICT COURT
S O U T H E R N DISTRICT OF TEXAS

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

RAMON MARTINEZ AND RODOLFO RAMIREZ,
Defendant-Appellant

APPELLANTS' BRIEF

[inapplicable parts omitted; and
brief's pages 42-49 quoted below]

POINT OF ERROR NO. THREE

The district court abused its discretion in limiting Mr. Martinez's opening statement.

POINT OF ERROR NO. FOUR

The district court abused its discretion in limiting Mr. Martinez's cross-examination of Government witness Javier Guerra.

POINT OF ERROR NO. FIVE

The district court abused its discretion in not allowing Mr. Martinez to introduce DE1 and DE1A.

ARGUMENT

During opening statement, defense attorney Connors was prevented from telling the jury Mr. Javier Guerra's reasons for lying (7R 30-31).

During Javier Guerra's cross-examination by defense attorney Connors, Mr. Connors was prevented from letting the jury know that Mr. Guerra had committed a federal offense by lying to a federal officer, that Mr. Guerra's sentence should have even between 78 and 90

months and that it was possible that Javier may have previously said that Mr. Ramon Martinez may not here known about the marihuana (9R 376-379; 387-392; 404-409).

The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). It has long been held that a primary interest secured by confrontation is the right of cross-examination. The Davis Court explained the following, id. 415 U.S. at 317, 94 S.Ct. 1110:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i. e.*, discredit, the

> witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in this case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Green v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

In the instant case, all defense counsel was trying to do was to show the jury what was motivating Mr. Guerra to lie. The district court did not allow defense counsel

to do so. The accuracy and truthfulness of Mr. Guerra's testimony was the key to Mr. Martinez's and Mr. Ramirez's conviction. Defense counsel should have been allowed full cross-examination, including the use of the tape recording transcribed by defense counsel. It was for the jury, not the district court to decide what Mr. Guerra was saying. The jury may have well decided that Mr. Guerra took it upon himself to implicate Mr. Ramirez.

POINT OF ERROR NO. SIX

The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction that the Executive branch of the Government acting through the United States Attorney for the Southern District of Texas has the exclusive right to decide whom to seek charges against and whom to prosecute and try for alleged involvement in criminal conduct.

POINT OF ERROR NO. SEVEN

The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction as to all the essential elements of 18 U.S.C. 1001.

POINT OF ERROR NO. EIGHT

The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction as to all the essential elements of 18 U.S.C. 1956.

POINT OF ERROR NO. NINE

The district court abused its discretion refusing to give Mr. Martinez and Mr. Ramirez requested jury instructions as to the applicable Federal Sentencing Guideline in Javier Guerra's case.

POINT OF ERROR NO. TEN

The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction as to the inference which can be made form having control over the place from where the

contraband is found.

POINT OF ERROR NO. ELEVEN

The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction as to the method of proving knowledge.

POINT OF ERROR NO. TWELVE

The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction on specific intent.

POINT OF ERROR NO. THIRTEEN

The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction on prior inconsistent statements of a witness other than the accused.

ARGUMENT ON POINT OF ERROR NOS. TEN THROUGH THIRTEEN

Consistent with F.R.Cr.P. 30, both Mr. Martinez preserved these questions for review by timely filing three requested jury instructions and by bringing them to the

district court's attention both at the informal recorded charge conference (14R 915-919) and by distinctly objecting to the district court's refusal to consider to so charge before the jury retired to consider its verdict. Mr. Ramirez also preserved error (15R 1002).

It is fundamental that when an appellant complains of refusal of a requested jury instruction, this Court will view the evidence under appellant's version of the fact and must look at the facts in the light most favorable to appellant, for each defendant is entitled to have the district court present jury instructions relating to each theory of defense for which there was any foundation in evidence, even though that evidence may be weak, insufficient, inconsistent, of doubtful credibility, or based only upon the testimony from the accused. See United States v. Hammons, 566 F.2d 1301, 1302 (CA5 1978); United States v.

Parker, 566 F.2d 1304 (CA5 1978), cert. denied, 435 U.S. 956, 98 S.Ct. 1589, 55 L.Ed.2d 808 (1978). The district court commits reversible by refusing to so charge the jury, if there is any evidentiary support whatsoever for a legal defense and the district court's attention is specifically directed to that defense. United States v. Goss, 650 F.2d 1336, 1344 (CA5 1981). The district court's refusal to deliver a requested jury instruction constitutes reversible error only if three conditions are met: (1) the instruction is substantively correct; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impaired the appellant's ability to effectively present a given defense. United States v. Grissom, 645 F.2d 461, 464-469 (CA 1981) [where the Court reversed after finding that the case met all three of the above

requirements]: United States v. Harrelson, 754 F.2d 1153, 1173-74 (CA5 1985) [where Elizabeth Chagra's conviction of conspiracy to commit first degree murder was reversed and a new trial ordered "... because the trial court's instruction allowed the jury to find Ms. Chagra guilty without the requisite proof of premeditation and malice aforethought and because that instruction constructively amended her indictment"], rehearing denied, 766 F.2d 186 (1985), cert. denied, 474 U.S. 908, 1034, 106 S.Ct. 277, 599, 88 L.Ed.2d 241, 578 (1985). But see United States v. Fooladi, 746 F.2d 1027, 1031-32 (CA5 1984), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 382 (1985) [where the district court erred in not instructing on a defensive theory, for the trial judge's imprimatur on a defensive theory is important; but the defendant's "conviction was saved by circumstance that his case was fully developed and argued to

the jury--ironically because he was well defended"].

Since there was little other substantive evidence other than Javier Guerra's testimony to prove Mr. Martinez's or Mr. Ramirez's guilt, it was imperative that they be allowed the opportunity to dispute the credibility of Javier Guerra. Mr. Guerra lied to agent Gonzalez on more than one occasion. The jury had every right to know that lying to a federal officer was a federal offense, and Mr. Guerra was not so charged by the Government because the Government chose not to charge him. The jury also had every right to know that Mr. Guerra was also guilty of the offense of money laundering and that he was not so charged because the Government chose not to charge him. The jury also had every right to know about what kind of sentence Mr. Guerra was avoiding by pleading guilty and assisting the Government in his "testimony". All this had a bearing on

Javier Guerra's credibility to show any motive Mr. Guerra had to lie, and the jury had every right to know that there was plenty to lie about.

Additionally, it is clear that the fact that the marijuana was found in Mr. Martinez' trailer played an important role in finding Mr. Martinez guilty. The jury had a right to know that this alone did not necessarily mean that the defendant had control and possession of the marijuana. U.S. v. Morgan, 581 F.2d 933 (D.C.CA 1978); U.S. v. Davis, 502 F.2d 681 (D.C.CA 1977); U.S. v. Bonham, 477 F.2d 1137 (CA3 1973); U.S. v. Freeze, 707 F.2d 132 (CA5 1983). The jury also had a right to know how they could infer knowledge of the conspiracy and marijuana in order to properly assess the guilt of both Mr. Martinez and Mr. Ramirez. U.S. v. Murrieta-Gejarano, 552 F.2d 1323 (CA9 1977); U.S. v. Campbell, 507 F.2d 955 (CA9 1974); U.S. v. Castillo-Burgos, 501 F.2d 217 (CA9 1974). The jury should have

also been told that prior to guilt, specific intent to violate the law should have been proven. U.S. v. Moore, 140 U.S. App. D.C. 309, 435 F.2d 113 (1970), cert. denied, 402 U.S. 906, 91 S.Ct. 1376, 28 L.Ed.2d 647 (1971); U.S. v. Stagman, 446 F.2d 489 (CA6 1971); U.S. v. Bessessen, 445 F.2d 463 (CA7 1971), cert. denied, 404 U.S. 984, 92 S.Ct. 448, 30 L.Ed.2d 368 (1972), reh. denied, 404 U.S. 1065, 92 S.Ct. 734, 30 L.Ed.754; U.S. v. Sirhan, 504 F.2d 818 (CA9 1974). See also dissenting opinion in U.S. v. Lilly, 512 F.2d 1259, 1274 (CA9 1975). The jury also should have been told that the fact that Mr. Guerra lied to the Government could be used for the purpose of judging his credibility. U.S. v. Bithoney, 472 F.2d 16 (CA2 1973), cert. denied 412 U.S. 938, 93 S.Ct. 2771, 37 L.Ed.2d 397. Counsel did not argue to the jury the law in those refused instructions. It was for the trial court to so instruct the jury. It was not harmless error for the

court to not do so.

CONCLUSION

For the foregoing reasons, Mr. Martinez and Mr. Ramirez request this appeals court to reverse the convictions and order judgments of acquittal or new trials.

Respectfully submitted today April 8, 1993.

Respectfully submitted by
Appellant's Attorney,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX